United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

10/22

75-2119

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -

UNITED STATES ex rel. DOLLREE MAPP
and ALAN LYONS,

Petitioners-Appellants, Docket No. 75-2119

-v-

WARDEN, New York State Correctional
Institution for Women, Bedford Hills,
New York, and WARDEN, Great Meadow
Correctional Facility, Comstock,
New York,

Respondents Appellees

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P/S

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On Appeal From the United States District Court
For the Eastern District of New York

BRIEF FOR APPELLANT LYONS

Rosner, Fisher & Scribner
Attorneys for Appellant
401 Broadway
New York, New York 10013
(212) 925-8844

of counsel:

NANCY ROSNER
JEFFREY DWIGHT ULLMAN

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BRIEF FOR APPELLANT LYONS

STATEMENT OF THE CASE

The petitioners were convicted in the Supreme Court of the State of New York, Queens County (George J. Balbach and a jury) on May 2, 1973 for possession of more than 10 ounces of a heroin mixture. (N.Y. Penal Law §220.23). They were sentenced to a term of 20 years to natural life.*

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*The petitioners were previously convicted at an earlier trial, but the conviction was reversed on grounds not relevant here. People v. Mapp, 39 A.D.2d 968, 333 N.Y.S.2d 539 (2d Dept. 1972).

On appeal the Appellate Division, Second Department, affirmed the convictions without opinion and leave to appeal to the New York Court of Appeals was denied.

In March 29, 1975, the petitioners filed an application for a Writ of Habeas Corpus in the United States District Court for the Eastern District of New York. The petitioners alleged five points in support of their application, viz: (1) There was insufficient probable cause to support the issuance of a search warrant; (2) The warrant was overbroad; (3) The seizure of the rent receipt from the home of appellant, Mapp, was unlawful since the seizure exceeded the scope of the warrant; (4) The disclosure of the informant's identity was required in this case; (5) The identification testimony of the witnesses Weiss and Martin should have been excluded.

In a Memorandum and Order dated April 24, 1975, the Hon. Walter Bruchhausen dismissed the petition. The petitioners moved for a reconsideration, or, in the alternative, for a certificate of probable cause. In a Memorandum and Order dated June 6, 1975, Judge Bruchhausen denied the application. From this denial, Alan Lyons appeals.

STATEMENT OF FACTS

Dollree Mapp and Alan Lyons were charged in a one-count indictment with possession of a dangerous drug in the first degree in violation of Section 220.23 of the Penal Law.

At trial, the People's case rested primarily on the testimony of four detectives who testified about the investigation which led to petitioners' arrest and indictment and the testimony of two identification witnesses.

Detective John Bergersen testified that he had originally been alerted to the petitioners' alleged activities by a confidential, but unreliable, informant in October 1969.

As a result of this information the petitioners were kept under periodic surveillance until their arrest on February 18, 1970. Most of this surveillance consisted of following the petitioners from Ms. Mapp's home at 118-46 Nashville Boulevard, Queens County, to an apartment building at 155-15 North Conduit Avenue, also in Queens. This apartment was mail-boxed to a Mr. and Mrs. Harold and Bettie Smalls.

On February 13, 1970, the officers obtained a search warrant for the persons of Mapp and Lyons and for the premises at Nashville Boulevard and apartment 2-R at North Conduit Avenue.

On February 18, 1970 the officers again followed Mapp and Lyons as they left her home on Nashville Boulevard at approximately 7:10 a.m. and drove to North Conduit Avenue Officer Bergersen drove ahead and stationed himself in the second floor stairwell in anticipation of their arrival (A335). The Petitioners soon thereafter entered the apartment. At approximately 9:00 a.m. Mapp then left the apartment and while she was still in her hallway the officer allegedly overheard Mapp say to Lyons:

When you finish those bundles, bring them home.

Lyons left the apartment at approximately 9:40 a.m. and was arrested as he was preparing to enter the second floor stairwell . Detective Bergersen, in possession of the search warrant, removed a brown paper bag from Lyons' pocket which contained 499 glassine envelopes which analysis later showed to contain a heroin mixture .

Keys to apartment 2-R were also allegedly removed from his pocket but, curiously, returned to him (. On a table in the apartment's entranceway the officers seized several cans of lactose and other drug-cutting paraphernalia and four plastic bags of white powder which analysis showed contained over 16 ounces of a heroin mixture . Also, found in a bowl on the table were telephone bills made out

to the name of Harold Smalls ( ). These bills were seized with the alleged narcotics and cutting paraphernalia ( ). No fingerprints of either petitioner were found on the contraband ( ). Alan Lyons was then arrested and taken into custody.

In the hallway the police then arrested and handcuffed a woman who lived in apartment 2-O, wrongfully believing her to be Ms. Mapp ( ). After learning of their mistake, Bergersen's partner, Wilson, and a Detective Fink, then drove to Mapp's home on Nashville Boulevard with a copy of the warrant which covered both premises ( ). No drugs were found there but rent receipts made out to "Harold Smalls" were found by Wilson in a search of the drawers of a dresser in petitioner Mapp's bedroom .

Thereafter, Ms. Mapp was also arrested and the instant prosecution followed.

POINT I.

THERE WAS INSUFFICIENT PROBABLE CAUSE TO SUPPORT THE ISSUANCE OF THE SEARCH WARRANT

The affidavit in support of the search warrant alleged the following:

(A) On October 6, 1969 a confidential informant who has not proven reliable in the past, told your deponent that Dollree Mapp, F/N/42 yrs. 5'5", 135 lbs. and Alan Lyons M/N/32 yrs. B#389755 are packaging and selling narcotic drugs, to wit: heroin, and are processing and cutting and packaging such drugs in premises 155-15 North Conduit Ave. Queens, New York apt. 2R. The confidential informant further states that Mapp and Lyons were storing such packaged drugs in premises 118-46 Nashville Blvd. Queens, New York in the part of the house occupied by them (first floor and basement).

(B) Said confidential informant further stated that on Feb. 1, 1970 Dollree Mapp told the informant that she and Alan Lyons were going to "bag-up" all day and could be reached at telephone #723-1387. A check of the records of New York Telephone Co. reveals that telephone #723-1387 is listed to one Harold Smalls apt. 2R, 155-15 North Conduit Ave. Queens, New York. On Feb. 1, 1970 at approximately 8:15 am your deponent followed Dollree Mapp and Alan Lyons from premises 118-46 Nashville Blvd. Queens, New York to premises 155-15 North Conduit Ave. Queens, New York wherein both Mapp and Lyons entered apt. 2R.

(C) Said confidential informant further stated that on Feb. 5, 1970 Dollree Mapp told the confidential informant that she and Alan Lyons were going to "bag-up" all day Sunday Feb. 8, 1970. On Feb. 8, 1970 your deponent, at approximately 8:20 am, followed Dollree Mapp and Alan Lyons from premises 118-46 Nashville Blvd. Queens, New York to premises 155-15 North Conduit Ave. Queens, New York. While inside said premises your deponent overheard Dollree Mapp say to Alan Lyons, "We're going to have to bust our mother-fucking asses to get this shit bagged up by tomorrow." Mapp and Lyons then entered apt 2R at which time your deponent left the premises.

(D) On Feb. 9, 1970 your deponent showed a photograph of Dollree Mapp to the secretary of Mr. Rose, the sales and management agent of the building 155-15 North Conduit Ave. Queens, New York and she identified Mapp as being the person who paid the rental fee for apt. 2R, 155-15 North Conduit Ave. Queens, New York.

(E) The confidential informant further stated that Dollree Mapp and Alan Lyons "bag-up" heroin and marijuana, at premises 118-46 Nashville Blvd., Queens, New York. On November 6, 1969 at approximately 8:00 pm, Det. Sylvan Topel, Sh. #1828, New York City Police Dep't. Narcotics Division, Special Investigating Unit called telephone instrument number LA 7-2994 located at premises 118-46 Nashville Blvd. Queens, New York and listed to Maudell Mapp and listened in while the aforementioned confidential informant spoke to Dollree Mapp. In the course of the conversation, Dollree Mapp indicated that she had a quantity of narcotics in her house at that time.

(F) On January 13, 1970 at approximately 4:40 PM Alan Lyons sold a quantity of heroin to John Doe, a police officer for a sum of U.S. currency in New York County.

It is petitioner's contention that insufficient probable cause existed for the issuance of the search warrant. Not only was the informant not shown to be previously reliable, but there was no indication of the source of his information, nor, in view of the testimony at the suppression hearings and at trial, was there ample independent corroboration of the information he allegedly gave. Indeed, the in-court testimony with regard to the police investigation revealed serious glaring discrepancies between the allegations in the warrant and the actual facts.

Initially, the affidavit did not even allege that

the informant had been reliable in the past. Moreover, there is nothing in the affidavit or the police testimony to show that the informant had ever been inside either of the two addresses named in the warrant, nor had he ever seen the petitioners in possession of drugs. The source of his information, furthermore, is never stated. Thus, as in the leading case of Spinelli v. United States, 393 U.S. 410 (1969), a magistrate simply "could not credit" the informer's information "without abdicating his constitutional function." (393 U.S. at 416). Indeed, in Spinelli, an allegedly reliable informant told the FBI that the defendant was operating a gambling business over certain telephone numbers. Here, the informant alleged that the petitioners were operating a drug plant at certain addresses. The types of allegations are the same as is the lack of any statement detailing the manner in which the information was gathered. Neither an independent magistrate, nor even a reviewing court, could safely rely on such information, since there is no way that "the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." Spinelli, supra, at 416. Indeed, the People in this case even conceded that "the informant's statements alone would not be enough" to have justified the issuance of the warrant ( ).

Not only was the informant's information lacking a discernable source, but the attempt by the detectives to

corroborate the information by ar objective check was not as conclusive as it was made to appear in the Bergersen affidavit. For instance, in paragraph A it is alleged that the informant told Bergersen on October 6, 1969 that petitioners were then processing drugs at the North Conduit Avenue address. Yet, evidence adduced on the People's direct case showed this fact to have been impossible, for 155-15 North Conduit Avenue was not open for occupancy until November 1969 ( ).* The affidavit of Detective Bergersen, however, nowhere mentions this gross inaccuracy. Had Bergersen made a truly objective check of the informant's information the rental office could have apprised him of this inaccuracy.

Too, when Bergersen testified at the hearings regarding his investigation, his testimony was laced with instances of being unable to recall crucial facts, or meetings with the informant, or specifics of the information given, as well as with inconsistencies in testimony, loss of notes relating to the events and a general inability to provide information. For instance, in paragraph B Bergersen's affidavit alleged that he followed the petitioners to the Conduit Avenue address where "both Mapp and Lyons entered Apartment 2R." Yet, when testifying, he was forced to admit that he did not see them enter that apartment. He only tailed them to the premises (. Further, with respect to his attempt to corroborate the informer tip, Bergersen stated in his affidavit that the informant was told on February 5 by Mapp that she and Lyons would bag-up all day

* Indeed, the People conceded that "Mrs. Smalls was unable to move into the building until November" (People's brief in App. Div., p. 4, fn.)

on February 8. Yet, at the hearing Bergersen testified that he did not see the informant from February 4 to February 8, and could not recall having talked to him on the telephone during that time ( ). How he could have received the information which prompted him to go to the premises thus is a complete mystery. Bergersen nevertheless alleged that he surveilled the premises on February 8 and heard a comment about bagging up made by Ms. Mapp.

Similarly, with respect to the February 1 information (¶B) Bergersen was unable to tell when he received the information, what time of day he received it, or even "if it was February 1st" ( ), as he so positively alleged in his affidavit.

> Q. When did he tell you that, on February 1st?
>
> A. I don't recall.
>
> Q. Did you know what time of day it was?
>
> A. No, I don't even know if it was February 1st.

Yet Bergersen alleged he went on duty at 3:00 a.m. on February 1, and tailed the petitioners to 2R, though later admitting he only watched them enter the building ( ).

Additionally, in paragraph E, Bergersen alleged that the informant made a telephone call to Mapp who said she had marijuana in her home. Yet on the hearing, Bergersen was forced to concede that he had no way of knowing whether the informant had actually spoken to Ms. Mapp during the alleged November 6 telephone conversation ( ).

Further inexplicable facts arose at the trial. For instance, although Bergersen and Detective Wilson allegedly made an exhaustive investigation into the activiites of Ms. Mapp and followed her on a number of occasions, had her photograph and was supposedly close enough to her to hear incriminating remarks, yet on the day the warrant was executed, Detective Wilson initially arrested the wrong woman, a person who did not even resemble Ms. Mapp .. ..

Beyond this, during the prosecutor's trial summation he told the jury that the police did not know about the North Conduit Avenue apartment until January 6, 1970 and that this was the first big break in the case and that the police learned about it strictly from surveillance ( ). This statement is so grotesquely at variance with the allegations in the affidavit that it gives rise to a strong suspicion of police perjury.*

In any event, the facts developed by the police investigation were insufficient in themselves to give rise to probable cause, which is indispensable to justifying the search warrant, e.g., Jones v. United States, 362 U.S. 257 (1960), and were insufficient to provide the necessary independent corroboration of the unreliable informer's information under the standards enunciated in Spinelli and Aguilar v. Texas, 378 U.S. 108 (1964);

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* Detective Bergersen was a member of the Special Investigations Unit (S.I.U.) of the Police Department. Subsequent to this trial he was found guilty in a departmental trial of having accepted $3,500 taken illegally from a narcotics dealer in March 1968, two years before the arrests in this case. He was dismissed from the force. The New York Times, July 8, 1974, p. 33, col. 2.

also see, United States v. Canieso, 470 F.2d 1224 (2d Cir. 1972); United States v. Warden of Attica State Prison, 381 F.2d 209 (2d Cir. 1967).

Indeed, the affidavit found insufficient by the Supreme Court in Spinelli is similar to the one in the present case in that both involve extensive, but inconclusive, surveillance of the defendants going from one address to another. Also see, Riggan v. Virginia, 384 U.S. 152 (1966) where the Supreme Court summarily reversed under Aguilar though the warrant affidavit was based on information from a reliable informant and observations by the police of the defendant's comings and goings from the suspect premises.

The major distinguishing feature in this case is perhaps the "bag-up" remark overheard, although not very clearly (T113)*, by Bergersen. But this overheard, while concededly suspicious, was not sufficient to create probable cause when coupled with the unreliable informant's information and the inability of Detective Wilson to corroborate Bergersen's overhearing of the remark (T563-4). Indeed, even if the overheard created suspicion regarding the North Conduit Avenue apartment, where the remark was allegedly made, there was nothing to indicate that the unreliable informer's information was corroborated as to Ms. Mapp's Nashville Boulevard premises, for which the search warrant was also directed. In fact, information regarding the Nashville Boulevard premises was completely stale when the search warrant issued for it, more than three months after

* References preceded by letter "T" refer to trial minutes.

the last item of information concerning that address (see Pt. III, infra). Thus, what is involved here is essentially the type of bootstrapping the Supreme Court would not accept in Spinelli where the Court observed that an informer's tip may not be used to give "suspicious color" to observed "innocent conduct" and then the observed conduct used to substantiate he tip. 393 U.S. at 415; also see, DeAngelo v. Yeager, 490 F.2d 1012, 1014 (3d Cir. 1973).

Moreover, while paragraph E alleges that during a telephone call on November 6 between the informant and Ms. Mapp, the petitioner stated she had narcotics* in her apartment, this allegation can carry little corroborative weight in light of its double hearsay character, its staleness in February 1970, and the inability of either Detective Topol or Bergersen to affirm that the informant had, in fact, spoken to Ms. Mapp. As was held in People v. Sullivan, 37 A.D.2d 559 (1st Dept. 1972), appeal dismissed, 29 N.Y.2d 937 (1972):

> The People argue that the test as to the informant's credibility and reliability of his information was met by the telephone call by Ford [the informant] to the defendant wherein Ford arranged to buy "another load" and would be "right down" and that further confirmation of this is demonstrated by the defendant opening his door in response to Ford's knock. This argument is without merit. The police officer never heard the defendant's responses during the telephone call, and in truth and fact Ford might well have been talking to himself or an otherwise complete stranger to the transaction for there was no check with regard to the identity of the person on the other end of the phone. In addition, the defendant was not previously known to the police and was not known to be a trafficker in drugs (cf. People v. Santiago, 13 N.Y.2d 326, 247 N.Y.S.2d 473, 196 N.E.2d 881).

323 N.Y.S.2d at 3. Also see, People v. Politano, 13 N.Y.2d 852

Additionally, the alleged sale to the "John Doe" undercover

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* Bergersen testified, however, that it was marijuana (., not narcotics -- another example of misleading in the affidavit.

agent described in paragraph F of the affidavit also adds little, if anything, in view of the failure to name the undercover informant. See, Roviaro v. United States, 353 U.S. 53 (1957). Furthermore, the alleged sale was made by Lyons and there is no showing that it was connected with Ms. Mapp. The fact that she was acquainted with Lyons and that he may have been involved with narcotics, is insufficient to bolster probable cause as to her or her apartment. Sibron v. New York, 392 U.S. 40 (1968).

Accordingly, in view of the facts that the informer was not previously reliable, that no source for his information was stated, that there were discrepancies between what was stated in the affidavit and the true facts and that Detective Bergersen's testimony was questionable because of his grave inconsistencies and inability to remember details, that the surveillance was equivalent to the inadequate surveillance in Spinelli, and that no sufficient corroboration of the information from the informant was provided, the warrant should be held invalid. Indeed, in view of the fact that the allegations in the affidavit contained material misrepresentations and false averments which appear to have been intentional, suppression of the evidence is mandated. United States v. Roth, 391 F.2d 507 (7th Cir. 1968); United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973); United States v. Thomas, 489 F.2d 664 (5th Cir. 1973); United States v. Marihart, 492 F.2d 897 (8th Cir. 1974); United States v. Belculfine, ____ F.2d ____ (1st Cir. Dec. 6, 1974) 16 Cr.L.Rptr.

2298. Moreover, where false or misleading statements are knowingly made in an affidavit by a law enforcement officer, the warrant will be invalid though the misrepresentations are not material. In United States v. Hunt, 496 F.2d 888 (5th Cir. 1974), which involved an affidavit made by an FBI agent, the court held:

> If the affiant intentionally makes false statements to mislead a judicial officer on application for a warrant, these falsehoods render the warrant invalid regardless of whether or not such statements are material to establishing probable cause.
>
> 496 F.2d at 894

As stated in United States v. Suarez, 380 F.2d 713, 716 (2d Cir. 1967), "it may be that testimony at trial could so clearly demolish statements in an affidavit supporting a warrant, that a prior denial of a motion to suppress would be overruled." Also see, United States v. Sultan, 463 F.2d 1066, 1070 (2d Cir. 1972), where the court suggested that a material and knowing misstatement would upset a warrant. To the same effect; United States v. Gonzales, 488 F.2d 833, 837 (2d Cir. 1973); United States v. Damitz, 495 F.2d 50 (9th Cir. 1974).

In MacDonald v. United States, 335 U.S. 451, 455-6 (1947), the Supreme Court held:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the

discretion of those whose job is the detection of crime and the arrest of criminals.

In the present case the magistrate was misinformed about the facts by the police affidavit and the writ should therefore be granted.

POINT II.

EVEN IF PROBABLE CAUSE EXISTED FOR THE NORTH CONDUIT AVENUE ADDRESS, THERE WAS NO PROBABLE CAUSE FOR A SEARCH OF THE NASHVILLE BOULEVARD PREMISES. THE WARRANT WAS THEREFORE OVERBROAD AND INVALID IN ITS ENTIRETY

As demonstrated in Point I, supra, whatever corroboration the overheard may have provided for believing that narcotics were in the North Conduit Avenue apartment, the remark could not provide any corroboration of the untested informer's allegations concerning Ms. Mapp's home on Nashville Boulevard. Neither was the allegation of the informant's telephone call described in paragraph E sufficient to corroborate the information that drugs were being stored at Nashville Boulevard.* People v. Sullivan, supra; People v. Santiago, 13 N.Y.2d 326 (1964); United States v. Roth, supra.

Additionally, probable cause was lacking as to Ms. Mapp's Nashville Boulevard premises for another important reason. That is, the information the police had concerning that address was unquestionably stale. The only information concerning the petitioner's home occurred on October 6 and November 6, 1969, the latter date being when the informer allegedly telephoned Ms. Mapp. Yet, the warrant was applied

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* It should be noted that the telephone call allegedly revealed that Ms. Mapp had marijuana in her home. (. . . This is hardly the same as confirming that her home was used as a storage dump for heroin, as the informer alleged.

for on February 13, 1970, and executed on February 18. Thus, the warrant was executed 104 days (more than three months) after the last information which bore on whether evidence of crime could be uncovered in a search of the Nashville Boulevard premises.

In Sgro v. United States, 278 U.S. 206 (1932), the Supreme Court held that a lapse of three weeks between the last allegation of probable cause and the issuance of the search warrant rendered the information stale. "The proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." Indeed, "the most convincing proof that the property was in the possession of the person or upon the premises at some remote time in the past will not justify a present invasion of privacy." Durham v. United States, 403 F.2d 190, 193 (9th Cir. 1968). Indeed, in dealing with substances such as marijuana in a home, the time limit between information and search has been extremely limited by the courts. Such information may be rendered stale by a matter of days, let alone the months involved here, as the courts have often held. Thus, in Ashley v. Indiana, 241 N.E.2d 264 (1968), allegations in a search warrant proved that marijuana was being sold from a certain premises eight days before. The court found that even the short delay dispelled probable cause to believe that the same evidence of crime would be on the premises eight days later:

> Although there can be no precise rule as to how much time may intervene between the obtaining of the facts and the issuance of the search warrant, in dealing with substance like marijuana which can be easily concealed and moved about, probable cause to believe that it was in a certain building on the 3rd of the month, is not probable cause to believe it will be in the same building 8 days later. (Id. at 269)

In People v. Wright, 367 Mich. 611 (1962), a six-day interval between obtaining the facts and the search warrant affidavit was held too long in a case involving operating a gaming house and serving liquor without a license. Similarly, in State v. Ingram, 445 P.2d 503 (Ore. 1960) a delay from January 9 to February 6 in a narcotics case was held too long since "it is not reasonable to infer that narcotics users have narcotics at their premises at all times." Only unusual circumstances, such as marijuana actually growing in a back yard [see, People v. Nelson, 171 Cal.App.2d 356 (1959)], or the residence where the marijuana was kept being uninhabitated (see, People v. Wilson, 182 Cal.App.2d 837 (1968)), will allow a delay of two weeks between discovery of the fact and the search. Obviously then, the intermisssion of 104 days between the time the informer allegedly ascertained that marijuana was in Ms. Mapp's home and the search here renders that information useless in obtaining a warrant for the petitioner's home in February.

The validity of a warrant is determined at the time of its issuance, and not its execution. United States v. Bailey, 458 F.2d 408, 411 (9th Cir. 1972); United States v. Markan, 356 F. Supp. 742, 745 (N.D. Ohio 1972), and it is

established principle that "a warrant cannot be partially valid and partially invalid. If it is invalid in part, it is invalid in its entirety." Ringle, Searches and Seizures, Arrests and Confessions, 241. Moreover, "for purposes of satisfying the state and federal constitutional requirements, the searching of two or more residential apartments in the same building is no different from searching two or more separate residential houses. Probable cause must be shown in each instance." People v. Rainey, 14 N.Y 2d 35, 37 (1964). By the same token, "When the cause shown does not cover as broad an area as the command to search" then the warrant is invalid. United States v. Hinton, 219 F.2d 324, 327 (7th Cir. 1955).

In People v. Lawrence, 31 A.D.2d 712, 296 N.Y.S.2d 849 (3d Dept. 1968) the court struck down a warrant which authorized the search of both the defendant's home and business for drugs, where there was no probable cause for each of the places specified in the warrant.

> Even if we assume that the affidavit states sufficient facts to authorize the issuance of a search warrant for one of the two places directed to be searched, if the affidavit is insufficient as to the other, it is insufficient as to both.
>
> "When the cause shown does not cover as broad an area as the command to search" then the warrant is invalid. (Citation omitted) (Emphasis added)
>
> 296 N.Y.S.2d at 853

Thus, in the present case the warrant must fail, since there was clearly no probable cause to search the Nashville

Boulevard apartment, regardless of whether there was probable cause as to the North Conduit Avenue premises.

POINT III.

THE SEIZURE OF RENT RECEIPTS FROM THE HOME OF PETITIONER MAPP WAS UNLAWFUL, SINCE THE SEIZURE EXCEEDED THE SCOPE OF THE WARRANT

The search warrant in this case authorized a search "for heroin and other dangerous drugs." Notwithstanding this express direction limiting the authority of the executing officers to seize, rent receipts, which were damagingly admitted into evidence to show the petitioner's control over the Conduit Avenue premises, were seized as a result of the search of the Nashville Boulevard home. It is petitioner's contention that the doctrine of Marron v. United States, 275 U.S. 192 (1927) prohibited the seizure of those items not named in the warrant and the subsequent introduction of those items into evidence.

The circumstances of the seizure of the rent receipts were covered in the two pre-trial suppression hearings in September 1970 and November 1972. Trial testimony, however, also revealed that a wholesale search of the Nashville Boulevard premises occurred and that this search was not one made incidental to an arrest since petitioner Mapp was not arrested until after the search had been completed, at which time Detective Bergersen arrived to join the searching officers Wilson and Fink (A357). It was Detective Bergersen who then made the arrest of Ms. Mapp.*

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* This sequence of events dispels any contention that the seizure of the rent receipts can be justified under the theory of a warrantless search made incident to a lawful arrest. See Sibron v. New York, 392 U.S. 40, 63 (1968).

Seized, inter alia, from the Nashville Boulevard address were savings bonds, currency, coins, keys, an attache case and the rent receipts. Thus, the scope of this search* was extended "to the seizure of objects -- not contraband, not stolen nor dangerous in themselves...." Coolidge v. New Hampshire, 403 U.S. 443, 471 (1971).

The Fourth Amendment requires that warrants particularly describe the things to be seized. This specificity of description requirement furthers the goal of privacy which the Fourth Amendment was designed to bring by insuring that even when a search is carried out pursuant to a warrant, the search is limited in scope so as not to be general or exploratory. As the Supreme Court stated in Marron v. United States, 275 U.S. 192, at 196 (1927):

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

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* It is clear that a warrant which is defective for lack of specificity will not be saved by the legal scope of a search:

> Although evidence which is seized may be within the description of the warrant, this is not determinative of the issue of the legality if [the warrant's] reach exceeds the bounds permitted by the fourth amendment.

Mascolo, Specificity Requirements for Warrants Under the Fourth Amendment: Defining the Zone of Privacy, 73 Dickinson L.Rev. 1, 13, citing People v. Bosco, 56 Misc.2d 1080, 290 N.Y.S.2d 481 (1968) and United States v. Markis, 352 F.2d 860, 864 (2d Cir. 1965) vacated on other grounds, 387 U.S. 425 (1967).

The continuing vitality of the Marron doctrine has been recognized by the New York Court of Appeals. In People v. Baker, 23 N.Y.2d 307, at 320-321 (1968) Judge Keating, writing for the majority, wrote:

> To permit the seizure of unauthorized items in the course of a lawful search would eliminate the constitutional requirement of "particularity' and would open the door for general searches abhorred since colonial days and banned by both the Federal and State Constitutions. The right to search for and seize one item does not permit the inference that there is probable cause for other items. More important, now that seizure of "mere evidence" is authorized, courts will have to be more diligent in assuring that an authorized search for a particular item is not used as a device to gain access for general exploratory searches for evidence thereby destroying the peoples' security in their persons, houses, papers and effects, guaranteed by the Fourth Amendment.

The court in Baker, moreover, noted the "recent affirmation of Marron" by the Supreme Court in Warden v. Hayden, 387 U.S. 294 (1967). 23 N.Y.2d at 321-2.

The hearing court, however, read the Supreme Court decision in Coolidge v. New Hampshire, 403 U.S. 443 (1971) to justify the seizure of the rent receipts, though not mentioned in the warrant, and the Appellate Division in People v. Neulist, 43 A.D.2d 150 (2d Dept. 1973) stated that Marron and Baker "have been overruled -- at least in automobile cases -- sub silencio...by Cady v. Dombrowski, 413 U.S. 433 (1973)."

Neulist does not affect this case any more than the predicate decision in Cady v. Dombrowski. This case does not involve, as did Cady and the second branch of the Neulist

opinion, the search of an automobile. In this regard, it must be emphasized that the distinction is determinative. Cady itself holds that there exists a

> ...constitutional difference between searches and seizures from houses and similar structures and [searches and seizures involving] vehicles....
> 37 L.Ed.2d at 715

Thus, whether or not the Marron-Baker rule has been "overruled sub silencio" by Cady as to automobile searches is of little relevance in a case involving the search of a house since Cady itself requires the application of a different legal standard to test the constitutional validity of a house or office search.

Moreover, Coolidge not only does not overrule Marron, but rather supports petitioners' claims in this case. For while Coolidge acknowledges that a "plain view" seizure may sometimes be made outside the scope of the warrant, such a seizure may be justified only where the discovery of the item in question was inadvertent. If the authorities expect to find evidence, the evidence which they anticipate turning up should be mentioned in the warrant. Thus explaining Marron, the Coolidge court wrote:

> In Marron v. United States, 275 U.S. 192, 72 L Ed 231, 48 S Ct 74, officers raided a speakeasy with a warrant to search for and seize contraband liquor. They arrested the bartender and seized a number of bills and other papers in plain view on the bar. While searching a closet for liquor they came across a ledger kept in the operation of the illegal business, which they also seized. There is no showing whatever that

> these seizures outside the warrant were planned in advance. The Marron court upheld them as "incident" to the arrest. The "plain view" aspect of the case was later emphasized in order to avoid the implication that arresting officers are entitled to make an exploratory search of the premises where the arrest occurs. See Go-Bart Importing Co. v. United States, 282 US at 358, 75 L Ed, at 383; United States v. Lefkowitz, 284 US 452, 465, 76 L Ed 877, 882, 52 S Ct 420, 82 ALR 775; United States v. Rabinowitz, 339 US, at 78, 94 L Ed, at 666 (Frankfurter, J., dissenting). (Emphasis added)
>
> 403 U.S. at 469, n. 26

Thus, Coolidge represents a further restriction on the "plain view" exception to the warrant requirement, as far as houses are concerned, and clearly underscores the continuing vitality of the Marron doctrine. See also, Stanley v. Georgia, 394 U.S. 557 (1969).

In the present case, the affidavit submitted in support of the search warrant shows that the detectives conducting the investigation were fully aware of the petitioners' control over the Conduit Avenue apartment and the name "Smalls" in connection with its rental. (E.g., paragraphs B and D). Thus, the discovery of rent receipts or other documents connected with the Conduit Avenue address could and should have been fully anticipated by the officers requesting the search warrant, and the warrant, therefore, should have specified such items as subject to seizure. Failing this direction, however, the items could not be seized pursuant to the warrant, and Marron compelled their suppression at trial. The writ should therefore be granted.

POINT IV.

THE DISCLOSURE OF THE INFORMANT'S IDENTITY WAS REQUIRED IN THIS CASE

The warrant in this case was secured mainly on the basis of Detective Bergersen's hearsay and double hearsay relations of statements allegedly made to him by a previously untested and unnamed informant. No affidavit or oral testimony by the informer was submitted to the issuing magistrate.

Most of Bergersen's alleged contacts with the informer were made over the phone ( ) and Bergersen could not produce any contemporaneously made memoranda or notes regarding the information supplied to him by the informer ( ). Simply stated, no corroboration of the informer's existence or of the exact information he gave to the police was ever produced.

At the 1970 suppression hearing counsel moved, under state authority of People v. Malinsky, 15 N.Y.2d 86 (1965) and People v. Verrecchio, 23 N.Y.2d 489 (1969) for production of the informer (. The application was denied.

It is petitioners' contention that the informer should have been produced in this case, particularly since there were strong indications of police perjury in the affidavit (see Point I, supra, which naturally raises the question of whether the informer, if he existed, told Bergersen what Bergersen related in his affidavit.

In Roviaro v. United States, 353 U.S. 53 (1957) the Supreme Court held that

> Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege [to withhold disclosure of the identity of informers] must give way.
>
> 353 U.S. at 64

In United States v. Tucker, 380 F.2d 206 (2d Cir. 1967) the rule in this Circuit for disclosure was stated to be that disclosure is required where "the informant's communications are essential to the establishment of probable cause." The word "essential," however, was qualified "to mean the essence or core or main bulk of the evidence brought forth which would otherwise establish probable cause." 380 F.2d at 212. The Tucker rule has consistently been followed in the Second Circuit, United States v. Shyvers, 385 F.2d 837 (2d Cir. 1967); United States v. Cappabianca, 398 F.2d 356, 358-9 (2d Cir. 1968); United States v. Malo, 417 F.2d 1242 (2d Cir. 1969); United States v. Colon, 419 F.2d 120 (2d Cir. 1969); and has been regarded as "settled." United States v. Commissiong, 429 F.2d 834, 893 (2d Cir. 1970).

In the present case, where there was hardly any corroboration by the police surveillance, the essential information here was provided by the informer. Thus, the police saw no narcotics, nor did they see any of the petitioners doing anything but going from one premises to another on two occasions. Without the informer's information, there would not be probable cause, but only suspicion. Under such circumstances, disclosure

is required. United States v. Robinson, 325 F.2d 391 (2d Cir. 1963). Moreover, even if probable cause could be established by information other than that provided by the informer, Tucker makes it clear that disclosure is required solely because the informer communication provided the "essence" of the information utilized for a finding of probable cause. Indeed, the informer information alone gave meaning to the surveillance and made what the officers said they saw significant.

But even beyond this, Tucker itself suggests a modification of the Tucker rule where an inference of police perjury arises. In Tucker, the court indicated that application of its rule for disclosure "assumes, of course, that the agents' sworn statements, both as to the existence of the informants and the substance of the information received, were truthful." 380 F.2d at 212. Also see, United States v. Colon, 419 F.2d at 122, supra. In Tucker, the court discounted the possibility of perjury, since the hearing court found such an allegation to be "almost entirely incredible." Here, however, the situation is quite different. As detailed in Point I, supra, Bergersen's inconsistencies, hesitations and failures to respond during examination, coupled with his strange inability to recall or document events, plus the actual errors, such as the impossibility of processing being done at the North Conduit Avenue address before it was opened for occupancy, all raise a strong suspicion of police perjury. It was entirely possible, indeed likely, that the informer here either did not exist or did not

report to Bergersen what Bergersen put in his affidavit or testified to on the stand. Indeed, this suspicion is greatly strengthened by a statement by the prosecutor during his closing argument to the jury, when he stated that the police did not know about the North Conduit apartment until January 6, 1970, that they learned about it strictly from surveillance and that this discovery was the first big break in the case ( ).

> If you recall Fink told you that on January 6, 1970, that he and Wilson were together. They followed that red panel truck first from 1733 Amsterdam Avenue out to Nashville Boulevard. They picked up a male Negro at Nashville Boulevard. They deposited him at the subway and then they went down to the chicken place at Queens Boulevard and Hillside Avenue. . . .
>
> Then when they left the chicken place down here at Hillside and Queens Boulevard, where did they go? 155-15 North Conduit Avenue. That was the first big break in this case. Because they had another location which they hadn't had up to this point.
>
> They didn't know about 155-15 North Conduit up until that point. They knew about Nashville Boulevard. They knew about 1733. But where's the other place? Where's the mill? Now they have a new location. And that's when the surveillance began at 155-15, which culminated in them going to see Joanna Fucello and showing her some pictures. And that's when they determined that apartment 2-R was the apartment in question. (Emphasis added)

This assertion, that until January 6, 1970 the detectives had no knowledge of petitioners' relationship to the Conduit Avenue premises, is so grotesquely at variance with the assertions in the affidavit in support of the warrant and so impeaching of the averments contained in paragraph A thereof,

that a serious question as to the possible utilization of perjury in securing the warrant's issuance exists. Accordingly, at the time of issuance and the renewal of all motions made during the proceedings on defendants' behalf, the motion requesting disclosure of the identity of the informant should have been granted.

The only ground ever voiced by the People in opposition to such disclosure was that there was sufficient independent corroboration. No affirmative reason in opposition to disclosure of the informant particularly was ever urged. Cf. People v. Ford, 61 Misc.2d 419, 305 N.Y.S.2d 772, 779 (Sup.Ct. Qns.Co. 1969).

In light of the insufficiency of corroboration and the inference of perjury raised by the remarks in the prosecutor's summation, and the evidence that Apt. 2-R could not have been occupied in October 1969, petitioners must be held to have been deprived of their opportunity to "prove the falsity of the affidavit by a preponderance of the evidence." People v. Irizarry, 64 Misc.2d 49, 31 N.Y.S.2d 384, 389 (N.Y.C. Cr. Ct. 1970). Indeed, since Bergersen testified at the hearing that he had known the informer for five or six months before October 1969 (A20) and at trial testified that he did not meet the informer before October 1969 (T65), it is entirely possible that Bergersen was simply making up the whole informer story to suit the circumstances. The writ should thus be granted.

CONCLUSION

THE WRIT OF HABEAS CORPUS SHOULD BE GRANTED.

Respectfully submitted,

ROSNER, FISHER & SCRIBNER
Attorneys for Petitioners

P. Gaimone